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No. 06-1595

IN THE
*SUPREME COURT OF THE UNITED STATES*

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VICKY S. CRAWFORD,
*Petitioner*
v.
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
*Respondents*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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# BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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Robert J. Sniffen
Sniffen Law Firm, P.A.
211 East Call Street
Tallahassee, FL 32301
(850) 205-1996

F. Damon Kitchen
Constangy, Brooks & Smith, LLC
200 West Forsyth Street
Suite 1700
Jacksonville, FL 32202
(904) 356-8900

Francisco M. Negrón, Jr.*
General Counsel
Lisa E. Soronen
National School Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
*Counsel of Record

Jack R. Wallace
Of Counsel
Constangy, Brooks & Smith, LLC
212 E. 84th St., Ste 5A
New York, NY 10028
(646) 797-9347

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## STATEMENT OF INTEREST[1]

The National School Boards Association ("NSBA") is a not-for-profit federation of state school boards associations located throughout the United States. NSBA and the members of its federation together currently represent more than 95,000 school board members, who govern approximately 15,000 local school districts across the country. These school districts employ more than 3 million teachers[2] as well as various staff employees, ranging from paraprofessionals, psychologists, and social workers, to bus drivers, custodians, building maintenance workers, and food service workers. Taken as a whole, the public school districts represented by NSBA constitute the single largest government employer in the nation, which is responsible for educating more than 47 million public school students.

In this case, NSBA seeks to provide the Court with argument and authority in support of its contention that passive involvement in an employer's internal investigation is neither opposition nor participation clause conduct under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a), with the requisite consent letters having been filed with the Clerk of this Court.

[2] National Center for Education Statistics, Digest of Education Statistics: 2007, http://nces.ed.gov/programs/digest/d07/tables/dt07_061.asp?referrer=report.

§§ 2000e *et seq.* (2008) ("Title VII"). Further, NSBA seeks to demonstrate how Petitioner's positions, if accepted, would negatively impact school districts across the country.

## SUMMARY OF THE ARGUMENT

Adopting Petitioner's view would protect passive involvement in an internal investigation, a position Congress did not envision in enacting Section 704(a) and which does not advance the goal of detecting and eliminating workplace discrimination. As the text of Section 704(a) and cases interpreting this provision make clear, some active involvement is necessary to secure protection under the opposition clause. Title VII has always required employees to step forward to ensure that the goal of eradicating discrimination is achieved. Moreover, the practical implications of allowing passive involvement to qualify as protected activity are profound, particularly for school districts, whose employees are generally scattered across multiple worksites and which are called upon to address the needs and concerns of a wide variety of constituencies. Further, if Petitioner's view is adopted, poorly performing employees could use Title VII as a sword to insulate themselves from adverse employment action by intentionally involving themselves in an internal investigation.

Petitioner's position regarding Title VII's participation clause is also without support. Each court that has had occasion to consider such an argument has flatly rejected it, and for good reason, since the text of Section 704(a) unequivocally requires that employees only receive protection with

respect to investigations that follow filing of a formal charge of discrimination with the EEOC. The practical implications of Petitioner's position are troublesome and unwieldy, and would severely impact the "business judgment rule," which is an essential sphere of discretion within which school districts and other employers must be able to operate in order to conduct their day-to-day business.

Finally, while school boards respect the basic tenants of Title VII, they also believe that an unsupported extension of Title VII will burden our nation's educational institutions. The internal reporting mechanisms created following this Court's decision in *Faragher v. Boca Raton*, 524 U.S. 775 (1998), are working well. There is no need to enlarge the types of conduct Title VII protects, particularly when doing so will lead to unwarranted fiscal and administrative burdens. Had Congress meant to protect passive cooperation, it certainly would have done so. It did not and, respectfully, neither should this Court.

## ARGUMENT

### I. PROTECTING AN EMPLOYEE'S MERE PASSIVE COOPERATION DURING AN EMPLOYER'S INTERNAL INVESTIGATION OF SEXUAL HARASSMENT UNDER SECTION 704(a) OF TITLE VII IS NOT NECESSARY TO PROMOTE THE DETECTION AND ELIMINATION OF DISCRIMINATION IN THE WORKPLACE.

When Congress enacted Title VII, nearly half a century ago, it adopted Section 704(a), which prohibits acts of retaliation in employment. In pertinent part, Section 704(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Since the enactment of Title VII, this Court has considered the breadth and scope of Section 704(a) on several occasions. *See, e.g., Robinson v. Shell Oil*, 519 U.S. 337 (1997);

*Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001); and *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006). In each case considered by this Court, the aggrieved employees engaged in an overt and affirmative act of opposition, or had otherwise initiated charge filing activity under Title VII, which triggered the protections of Title VII. In *Robinson* and *Burlington Northern*, the aggrieved employees were expressly protected by Section 704(a)'s participation clause because they filed charges of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). 519 U.S. at 339; 126 S. Ct at 2409. In *Clark County Sch. Dist.*, the employee initiated complaints about offensive comments to her supervisor and two assistant superintendents. 532 U.S. at 269-270.[3]

In stark contrast to the aggrieved employees in these cases, Petitioner in the instant case, Vicky

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[3] This Court ultimately found that the employee in *Clark County Sch. Dist.* did not engage in opposition activity because no reasonable person could believe that what she complained about was an unlawful practice of the employer. 532 U.S. at 271. Similarly, in the instant case, no reasonable person could believe that Petitioner's interview responses about her alleged harasser (an individual who did not have supervisory authority over Petitioner) describe an unlawful employment practice of Respondent. There is no evidence that Respondent knew or should have known of the alleged misconduct. *See McGinest v. GTE Service Corp.*, 360 F. 3d 1103, 1119 n.13 (9th Cir. 2004)(noting that a negligence standard applies where alleged harasser did not supervise the plaintiff, even if the alleged harasser supervised others); and *Faragher*, 524 U.S. 775, 807 (holding that vicarious liability applies only where actionable harassment is "created by a supervisor with immediate (or successively higher) authority *over the employee*")(emphasis supplied).

Crawford, claims she engaged in protected activity solely because she gave information regarding her own alleged experiences of sexual harassment in response to an internal inquiry undertaken by her employer. Petitioner did not take the initiative to register with her supervisors either a formal or informal complaint opposing any unlawful conduct, nor did she participate in any manner in an investigation, proceeding, or hearing involving the EEOC. It is equally significant that Petitioner never filed with the EEOC any charge complaining that she had been the victim of sexual harassment prior to being terminated by Respondent for legitimate business reasons. As more fully explained below, a person's failure to act or otherwise pursue the available internal or external complaint mechanisms available (such as Petitioner failed to do in this case) compels a conclusion that no activity protected under Title VII has occurred.

### A. Section 704(a) Opposition Protects Only Those Employees Who Actively Assist in Bringing Harassment to Light by Reporting or Initiating a Complaint of Unlawful Conduct

#### 1. Active opposition by employees is essential to detecting and eliminating harassment in the workplace.

In her brief, Petitioner opines that the Sixth Circuit erred in determining "that opposition is only protected if it is 'active.'" Pet. Br. 47. Petitioner further contends—without any supporting legal

authority—that the protections of Section 704(a) are not limited merely to those who "initiate" or 'instigate' a complaint." *Id.* (*quoting* Pet. App. 7a). Notwithstanding Petitioner's dramatic references to various historical events to support her contentions, her arguments are devoid of merit. Simply stated, relying on the plain text and unambiguous meaning of Section 704(a), several courts have made it clear, that employees must "initiate," or make "active" or "overt" complaints to trigger the protections of the opposition clause. These cases recognize an important principle at stake in this case: to achieve the goal of eradicating discrimination in the workplace, aggrieved individuals must take the initiative to report discrimination, or avail themselves of the right to seek redress through the filing of a charge of discrimination.

For example, in *Minnis v. McDonnell Douglas Tech. Services*, 162 F. Supp. 2d 718, 739 (E.D. Mich. 2001), a Michigan district court found that "[i]n order to engage in protected opposition activity under Title VII . . . *a plaintiff must make an overt stand against suspected illegal discriminatory action*" (emphasis supplied). Similarly, in *McNorton v. Georgia Dep't of Transp.*, 2007 WL 4481431 at *14 (N.D. Ga. 2007), a federal district court in Georgia determined that an employee's mere cooperation in answering questions during an employer's internal investigation did not constitute protected opposition activity, because to do so would "require this Court to ignore the plain meaning of this statute."[4] Likewise, in *Parker v. Baltimore and*

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[4] In so finding, the district court in *McNorton* observed:

*Ohio Railroad*, 652 F.2d 1012, 1019 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia noted that "[t]he enforcement scheme Congress chose for Title VII *relies heavily on the initiative of aggrieved employees*" to come forward to report unlawful discrimination (emphasis supplied).

Title VII protects individuals who come forward and oppose discrimination for a reason: an employer cannot redress sexual harassment if it does not know about it. As more than one court has observed, "[t]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists." *Shaw v. AutoZone*, 180 F. 3d

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"Oppose" means to "offer resistance to." *Merriam-Webster's Collegiate Dictionary* 816 (10th ed. 1999); *see also The New Oxford American Dictionary* 1201 (2001)("disapprove of and attempt to prevent, esp. by argument"); *The American College Dictionary* 850 (1. to act or contend in opposition to; to drive against; resist; combat. 2. to stand in the way of; hinder. 3. to set as an opponent or adversary. 4. be hostile or adverse to, as in opinion. 5. to set as an obstacle or hindrance; *to oppose reason to force.* 6. to set against in some relation, as of offsetting antithesis, or contrast; *to oppose the advantages to the disadvantages.* 7. to use or take as being opposite or contrary: *words opposed in meaning.* 8. to set (something) over against something else in place, or so as to face or be opposite. 9. to be or act in opposition) (emphasis in original).

2007 WL 4481431 at * 13.

806, 813 (7th Cir. 1999); *see also Barrett v. Applied Radiant Energy*, 240 F. 3d 262, 268 (4th Cir. 2001).

To their chagrin, employers are often in the dark about sexual harassment occurring in the workplace. Many reasons contribute to this lack of awareness. For example, it is often unpleasant, uncomfortable and embarrassing for employees to discuss incidents of harassment with an employer. However, it is well-settled that these reasons do not excuse failing or refusing to come forward and bring to the employer's attention discrimination in the workplace. *See Shaw*, 180 F. 3d at 813 ("we conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate an employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."); *Coates v. Sundor Brands*, 164 F. 3d 1361, 1366 (11th Cir. 1999) ("the problem of workplace discrimination...cannot be corrected without the cooperation of the victims."). Thus, an employee who fails to meet the duty to come forward and report harassment pursuant to her employer's internal reporting mechanisms cannot sustain a claim for harassment pursuant to this Court's decision in *Faragher*. For the same reasons, an employee who fails to report such allegations under the same internal mechanisms should not be permitted to invoke the protections of Title VII's opposition clause.

School boards and school administrators in particular, often work at different worksites than the employees for whom they are responsible. This makes it difficult to be aware of harassment that may be occurring in the district. Yet, at the same time, school boards are ultimately responsible to

ensure Title VII is not violated. Because school boards are typically removed from the day-to-day operations of the school district, they are extremely unlikely to know about sexual harassment unless a complainant clearly and unequivocally reports the conduct. *See Baynard v. Malone*, 268 F. 3d 228, 236 (4th Cir. 2001)(holding that school board personnel director was not deliberately indifferent to student harassment, in contrast with school principal, who was responsible for "day-to-day supervision" of alleged harasser); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F. 3d 648, 659 (5th Cir. 1997)(noting that "in large school districts . . . school board members have little contact with the day-to-day interactions between teachers and students."). In the same regard, school administrators typically supervise a large of number of people in a variety of settings, and, at the same time, are responsible for interacting with and addressing the needs of a variety of other constituents, such as students, parents and the public in general. Because of their unique staffing structures, the multiple constituents with which they interact and the fact that they are required to oversee employees scattered throughout multiple locations, school districts must rely on individuals who actively oppose harassment to help them determine when sexual harassment is taking place.

### 2. Employees who unreasonably fail to use the reporting procedures established by their employers are not engaged in active opposition.

This Court has previously stated that a primary purpose of Section 704(a)'s anti-retaliation provision is maintaining "'unfettered access' to Title VII's remedial mechanisms." *Burlington Northern*, 126 S. Ct. at 2415 (*quoting Robinson*, 519 U.S. at 316). At the same time, this Court has repeatedly made clear in Title VII cases, that "victims have 'a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute.'" *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146 (2004) (*quoting Faragher*, 524 U.S. at 806). In the case *sub judice*, Petitioner did not use such reasonable means, either to protect herself, or to protect other alleged victims of sexual harassment.

As this Court has previously instructed, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth v. Burlington Indus.*, 524 U.S. 742, 764 (1998). In keeping with this Court's pronouncement in *Ellerth*, Respondent, like many other school districts, implemented a detailed Employee Harassment Policy. Resp't Br. 31. This policy not only defined the kinds of conduct that

constituted sexual harassment, it further provided detailed instructions on how and to whom to report harassment. In particular this policy stated "[a]ny employee who believes that he/she is the victim of harassment or who witnesses harassment should report the harassment. Employees may report the harassment to any one or all of the following: (A) the employee's supervisor; (B) the supervisor of the offending person; (C) the principal of the employee's school or the head of the employee's department; (D) the Personnel Department, and/or (E) the Title IX Coordinator." http://www.mnps.org/assetfactory.aspx?did=3531. Despite the existence of this policy, Petitioner never reported her alleged experiences of sexual harassment to any of the persons identified therein. Nevertheless, she now attempts to claim protection under Section 704(a) by asserting she "reported" harassment in a manner not contemplated by Respondent's Employee Harassment Policy and to individuals who are not identified within that policy.

In the harassment context, it is well-settled that when an employer provides a reasonable mechanism for reporting harassment and the employee fails or refuses to employ that mechanism, then the employer is entitled to assert an affirmative defense to liability and damages. *See Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807-808; *Jackson v. Arkansas Dep't of Educ., Voc. and Tech. Educ. Div.*, 272 F.3d 1020, 1025-1026 (8th Cir. 2002) (employee who unreasonably failed to report harassment under her employer's harassment policy until eight months after the harassment occurred was unable to maintain her harassment claim). Why then, should not

Petitioner's failure to reasonably take advantage of the reporting mechanisms contained in Respondent's Employee Harassment Policy preclude her from asserting that she has engaged in protected opposition under Section 704(a)? If this Court's pronouncement in *Suders* regarding the duty of employees to exercise reasonable means to avoid or minimize harm is to be anything other than a hollow platitude, the Petitioner should not be granted Title VII protection when she failed to come forward until summoned to do so in an internal investigation.

### 3. Protecting employees who ignore established reporting procedures may lead to less efficient and effective investigations by employers.

Any determination that employees can choose to ignore the internal reporting mechanisms created by the employer, and then assert they are nonetheless protected by Title VII's opposition clause because they merely provided answers to an employer's internal investigation or inquiry will generate a host of problems for employers, including public school districts. First and foremost, such a determination will create utter confusion. Public school boards routinely conduct investigations and inquiries into a wide range of matters, including, but not limited to, complaints of sexual harassment. On an annual basis, school boards are likely to conduct more harassment investigations than other employers, whether in the private or public sector, because, in addition to investigating claims of

employment harassment under Title VII, they have a responsibility to investigate complaints of sexual harassment against students arising under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (2008).[5]

Many employers (including Respondent in the instant case) have implemented anti-harassment policies that set forth clearly defined reporting procedures, making it easier for employees to report harassment and simpler for the employer to determine whether a complaint has been made and by whom. The implementation of such policies goes a long way toward the elimination of workplace discrimination since, as this Court recognized in *Suders*, "[t]he employer is in the best position to know what remedial

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[5]As this Court recently held in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-182, (2005) claims of retaliation are actionable under Title IX. In particular, this Court noted:

> If Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it . . . .
>
> Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination.

544 U.S. at 180-181 (*citing Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 289-290) (1998).

procedures it offers and how those procedures operate." *Suders*, 542 U.S. at 146 n. 7. If courts allow employees to ignore such procedures, and maintain opposition-based retaliation claims for merely answering questions posed during internal investigations, a school board may not always be able to accurately determine when a complaint has been made and who is a complainant, resulting in confusion as to whether its policies apply and possible failure by the employer to respond in an timely and effective manner to incidents of harassment "reported" during an investigation.

To be deemed protected activity under Section 704(a)'s opposition clause, the employee's statements to his employer must, at minimum, be sufficient to place the employer on notice that the employee is registering a complaint. *See Blount v. Glickman*, 1998 WL 325235 at *6 (N.D. Ill. 1998). As one district court has explained in determining whether an employee has engaged in protected opposition, "the relevant question . . .is not whether a formal accusation of discrimination is made, but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted, or is acting in an unlawful manner." *Black v. Veatch Prichard, Inc.*, 155 F. Supp. 2d 1285, 1295 (D. Kan. 2001).

In addition to creating confusion and a burden upon the limited economic resources and staff of school boards, the NSBA also foresees another serious problem if individuals in Petitioner's position are permitted to assert and maintain retaliation claims under the opposition clause. Petitioner contends that "unequivocal

protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII." Pet. Br. 31. Although at first blush, it might appear that interpreting Title VII to encompass individuals who do not actively and overtly initiate complaints or reports of harassment serves Congress' intended purpose of eradicating discrimination, such an interpretation may actually deter employers from thoroughly conducting internal investigations.

Petitioner's case is a classic example. The record does not reflect that any of the employees who caused Respondent to initiate its internal investigation ever identified Petitioner as someone who had experienced, or had knowledge of, Gene Hughes' alleged acts of sexual harassment. Instead, the employer, in an effort to be thorough and to correct any improper activity, summoned Petitioner to participate in its investigation. As a reward for its efforts, Respondent is now defending itself in a Title VII lawsuit.

Title VII does not mandate that employers implement internal reporting mechanisms and grievance procedures to prevent and correct harassment. Nor has any decision by this Court required that employers do so. Instead, as an incentive for employers to institute internal remedial mechanisms, this Court has created an affirmative defense that employers can sometimes take advantage of if they have in place procedures for preventing and correcting unlawful harassment. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. So long as an employer provides a

reasonable internal procedure for preventing and correcting discrimination and an employee unreasonably fails to use that procedure (as was the case with Petitioner), then the employer may be afforded the opportunity to assert the affirmative defense. However, if Petitioner's interpretation of Title VII is given credence, employers will have little incentive to do more than the minimum required to achieve the affirmative defense. Indeed, employers will perceive an obvious disincentive to take more thorough remedial measures, for doing so may expose them to greater risk of civil liability.

Likewise, if employees who merely give information at their employer's request during internal investigations can assert retaliation claims under the opposition clause any time they anticipate the possibility of adverse action in their futures, then it is reasonably foreseeable that more than a few individuals will intentionally relate information to employers during internal investigations for the sole purpose of insulating themselves from such adverse action. Such a development would create a substantial impediment for school boards, and other employers. First, the information provided by such employees may be based on nothing more than suspicions, rumors, or utter fabrications. Employers already taxed with staffing and budgetary concerns will unnecessarily waste time and money exploring insignificant or dubious matters, the truth or falsity of which they may never be able to uncover. Second, as discussed in more detail in Section II, *infra*, employers who have legitimate grounds for terminating or disciplining employees with performance and/or disciplinary

problems, will face the prospect of civil litigation should they attempt to do so.

Such concerns militate against giving Section 704(a) the expansive interpretation Petitioner seeks. As more than a few federal courts have noted, employees bringing Title VII claims of unlawful retaliation are "generally granted less protection for opposition than participation in enforcement proceedings." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (*citing Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969)). *See also Anduze v. Florida Atlantic Univ.*, 151 Fed. Appx. 875, 878 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 2865 (2006) (citing *Total Sys. Services*, 221 F. 3d at 1174, and stating that "[o]pposition Clause acts are viewed in the context of the ordinary business environment, and, thus, are given less protection than Participation Clause acts"); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 n. 4 (4th Cir. 1998); *Sawicki v. American Plastic Toys.*, 180 F. Supp. 2d 910, 915 (E.D. Mich. 2001); and *Minnis*, 162 F. Supp. 2d at 739. The rationale behind these decisions is the recognition that certain forms of opposition simply do not fall within the ambit of Section 704(a)'s protections. *See Booker*, 579 F.2d at 1312 (*citing Holden v. Owens-Illinois*, 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986). As the Sixth Circuit observed in *Booker*, in order to determine if an employee's acts warrant protection under the opposition clause of Section 704(a):

> Courts are required to "to balance the purpose of the Act to protect persons

> engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel . . . . The requirements of the job and the tolerable limits of conduct in a particular setting must be explored." *Hochstadt v. Worchester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *see also Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984).

*Booker*, 579 F.2d at 1312; *see also Sawicki*, 180 F. Supp. 2d at 916.

Employing this balancing test in the present case, it is apparent that Petitioner's cooperation with her employer's internal investigation was not a reasonable form of opposition clause activity. Moreover, for the reasons above, even if this Court were to conclude otherwise, allowing employees to assert they have protected status merely because they answered questions asked of them in internal investigations would seriously bind the hands of their employers with respect to the selection and control of personnel, and would, as a practical matter, elevate opposition clause activity to the same level as participation clause activity.

### B. Protecting Employees Who Merely Cooperate in an Employer's Internal Investigation Under the Participation Clause in Section 704(a) Is Not Necessary to Advance Title VII's Purpose of Detecting and Eliminating Harassment and May Have the Opposite Effect

As an alternative to her opposition clause arguments, Petitioner contends that her disclosure, during the course of an internal investigative interview, of sexual harassment she allegedly endured constitutes participation in "an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). However, thus far, no published court decision has ever reached such a conclusion. Quite the contrary, the only courts to consider the issue of whether an employee's involvement in an employer's internal investigation amounts to protected activity under Section 704(a)'s participation clause have uniformly rejected that notion. *See Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003); *E.E.O.C. v. Total Sys. Services*, 221 F. 3d 1171, 1174 (11th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1005-1006 (8th Cir. 1999); and *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990).

In each of these cases, the respective courts expressly concluded that the protections of Title VII's participation clause are limited to investigations flowing from the filing of a formal charge with the EEOC. As succinctly stated by the Court of Appeals for the Eleventh Circuit:

> The participation clause covers participation in "an investigation under . . . this subchapter," that is, an investigation under subchapter VI of Chapter 21 of Title 42 (42 U.S.C. §§ 2000e-2000e-17). 42 U.S.C. § 2000e-3(a). This clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC.

*Total Sys. Services*, 221 F.3d at 1174.

Petitioner contends that because an employer's internal investigations serve Congress' goal of encouraging voluntary compliance with Title VII, then, *a fortiori*, it must be concluded that such internal investigations by employers are encompassed by the participation clause. Pet. Br. 22-23. However, this contention wholly ignores the fact that the plain text of Title VII does not *require* an employer to conduct internal investigations in the first place. As set forth above, this Court has recognized that an employer's implementation of remedial mechanisms is not mandatory, and to encourage adoption of such voluntary measures, the Court has provided employers an incentive to do so through the creation of an affirmative defense in certain kinds of harassment cases. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. An employer's voluntary internal investigation stands

in stark contrast to the statutorily mandated investigations conducted by the EEOC pursuant to the express terms of Title VII. *Cf.* 42 U.S.C. § 2000e-5(b) (stating that the EEOC will investigate charges of discrimination filed with it).

In her brief, Petitioner also asserts that "[u]nequivocal protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII." Pet. Br. 31. According to Petitioner, "the abusive official can be confident that any anti-retaliation litigation will be dismissed—as occurred in the instant case—without inquiry into whether the asserted retaliation occurred." *Id.* at 30. Essentially, Petitioner is saying that employers cannot be trusted to combat employment discrimination and retaliation in their workplaces absent being required to do so by law.

Such an assertion is not only offensive, but entirely baseless as well. As noted above, many employers throughout the nation, including school boards, have adopted anti-harassment and anti-discrimination policies and provide training to implement these policies out of a concern for the well-being of their staffs and the knowledge of the toll that unlawful discrimination can have on the productivity and morale of their workforces. *See, e.g., Harper v. City of Jackson Municipal Sch. Dist.*, 149 Fed. Appx. 295, 300 (5th Cir. 2005)(holding that school district's written harassment policy and response to the plaintiff's complaint was "reasonable and vigorous"); *Bryant v. School Bd. of Miami Dade County*, 142 Fed. Appx. 382, 385 (11th Cir. 2005)(holding that school board was not liable for

sexual harassment under Title VII where it "posted its sexual harassment policy quite extensively"). Many, if not most, of these employers had such policies in place prior to this Court's creation of the aforementioned affirmative defense. *See, e.g., Redman v. Lima City Sch. Dist. Bd. of Educ.*, 889 F. Supp. 288, 294 (N.D. Ohio 1995)(holding that school district was not liable under Title VII based on its effective response to sexual harassment complaint pursuant to its policy). NSBA submits that this reality, coupled with the fact that employers are not required by law to implement such policies, is compelling proof that most employers are not motivated to engage in or tolerate conduct that violates Title VII.

Pursuant to these internal policies, school districts routinely conduct investigations after receiving complaints of unlawful conduct and have every incentive to ensure such investigations are thorough and fair and result in appropriate consequences for those who have violated school policies and federal and state laws prohibiting workplace discrimination. Beyond avoiding liability for failing to effectively respond to harassment and discrimination, school districts' important roles in their communities provide an added incentive to conduct investigations fairly and not to retaliate against employees who respond to an investigator's questions. School districts cannot afford to engage in retaliatory actions that would give them the reputation in their communities for operating schools where perpetrators of harassment and discrimination are tolerated and those who dare to provide information against such offenders are disciplined or terminated. Communities rightfully

expect and demand that school districts provide staff and students with environments that are safe, secure, orderly and conducive to effective instruction and learning. In the absence of such environments, school districts, which often struggle to fill positions such as superintendents, math and science teachers, and special education teachers, would find it even more difficult to hire and retain the qualified staff essential to carrying out their educational mission.

As aptly noted by the Sixth Circuit in the case below, strong policy arguments exist that discourage expanding the scope of the participation clause to encompass employee cooperation in internal investigations:

> The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them. We will not alter this limit delineated by the language of Title VII and recognized by this court and others.

*Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 211 Fed. Appx. 373, 377 (6th Cir. 2006). The onerous impact of Title VII is no less

acute on school boards across the nation, that routinely conduct investigations into alleged violations of the statute.

The facts of Petitioner's case illustrate all too well how school boards might become discouraged from being proactive and conducting internal investigations in the absence of an EEOC charge if the protection Petitioner seeks is afforded to her. In this case, the superintendent of schools made the recommendation to Respondent to terminate Petitioner. Resp't Br. 6. However, he did so based on the legitimate, nondiscriminatory grounds that Petitioner had engaged in acts of embezzlement and drug use. *Id.* at 8 n.12. Although the superintendent did view a final report of the investigation in which Petitioner was interviewed, it only contained a summary of the information gathered and for confidentiality reasons did not either identify Petitioner by name, or otherwise attribute any specific statements to Petitioner. *Id.* Hence, it is illogical to conclude that the superintendent's recommendation to terminate Petitioner was in any way related to her involvement in Respondent's internal investigation.

Many school boards across the country, like Respondent, provide similar confidentiality in investigating harassment and use similar discipline and termination processes that make extending Title VII protection to those employees who merely cooperate in an internal investigation particularly troublesome. In many districts, the school board terminates employees based on the recommendation of administrators. The school board is not involved in the day-to-day operations of the school district and is not involved in the routine investigation and

decision-making process related to dealing with sexual harassment and discrimination complaints unless an aggrieved employee specifically brings the matter to the school board's attention. Thus, when a school board terminates an employee, it is unlikely to know whether that employee participated in a sexual harassment investigation.

Likewise, the administrator recommending the termination to the school board and the employee's immediate supervisor (who may have made the initial termination recommendation to the administrator) are likely to have no idea the employee participated in a sexual harassment investigation or what the employee said in the investigation for two reasons. First, except in very small school districts, neither the administrator recommending the termination nor the employee's immediate supervisor is likely to have conducted the sexual harassment investigation in most circumstances. Second, school district sexual harassment procedures commonly protect the confidentiality of employees who participate in investigations to encourage employees to speak candidly. Thus, most individuals in a school district responsible for recommending termination of employees are unlikely to know any particular employee participated in an internal sexual harassment investigation unrelated to the proposed termination, much less the content of that employee's statements. As a result, the immediate supervisor, the recommending administrator, and the final decisionmaker, usually the board of education, are all unlikely to have received information that would enable discharging or

disciplining an employee in retaliation for cooperating in a harassment investigation.

NSBA is equally concerned that any ruling by this Court that employees who are involved in internal investigations are automatically protected by Title VII's participation clause will do serious damage to the "business judgment rule." It is well settled that the role of the court is not to "sit as a super-personnel department that reexamines an entity's business decisions . . . ." *See Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). However, if Petitioner's interpretation of Title VII is adopted, every adverse action a school board takes against any employee who has ever been involved to any degree in an internal investigation will be subject to a Title VII claim for retaliation. Surely this was not Congress' intent when it enacted Title VII. Such a ruling would only serve to "tie the hands of employers in the objective selection and control of personnel . . . ." *Booker*, 579 F.2d at 1312.

Additionally, in their briefs, both Petitioner and the National Employment Lawyers Association ("NELA") lament that unless Section 704(a)'s protections are extended to employees who are summoned to give interviews in internal investigations conducted by their employers, the EEOC will be inundated by prophylactic charges of discrimination. Pet. Br. 39; NELA Br. 23. This argument fails for three reasons. First, such an argument flatly contradicts historical experience. Since the EEOC was created by the passage of Title VII, employers have long been conducting internal investigations. At no time has this Court or any

other court held that Section 704(a)'s protections apply to mere cooperation in an internal investigation, prior to the filing of an EEOC charge. Yet NSBA is not aware of any "deluge of pre-emptive charges" filed by cooperating witnesses with the EEOC at any point in history. If such an avalanche of prophylactic charges has never occurred up to this point, why would such an event happen now simply because the Court declines to expand Title VII as Petitioner desires?

Second, as already explained above, the vast majority of employees giving information in such internal investigations will have no rational basis for fearing retaliation from their employers. However, for those employees who do, the easiest and simplest way for them to protect themselves would be to clearly and affirmatively register an internal complaint or report their opposition to practices made unlawful by Title VII. In such a circumstance, the employee would be shielded from future adverse action by Section 704(a)'s opposition clause. This is what Congress intended when it created Section 704(a), and had Petitioner made such an internal complaint herself, the courts below would have determined that she engaged in protected activity.

Finally, this argument ignores the real possibility that granting employees Title VII protection for participating in an employee's internal investigation will discourage employers from pursuing internal investigations, which could just as plausibly lead to the same negative result—more cases being filed with the EEOC. If employers know that every employee they ask questions of in an internal investigation regardless of what they

say (truthful or untruthful, relevant or irrelevant) will be given Title VII protection, an employer's incentive to conduct an internal investigation will be reduced. Employer incentives to conduct internal investigations will be particularly low if the employer knows it will have to interview marginal employees that may have relevant information about the case. Instead of spreading a wide blanket of anti-retaliation protection, the employer may instead tell the complaining employee to take her case to the EEOC.

## II. PETITIONER'S OVERLY BROAD INTERPRETATION OF TITLE VII'S RETALIATION PROVISION WILL SEVERELY IMPACT AMERICA'S ALREADY OVERBURDENED PUBLIC SCHOOL SYSTEM.

NSBA and its members are dedicated to ensuring excellence and equity in America's public education system. However, unlike private educational entities, public school districts must rely on limited governmental resources to achieve their mission. These resources must be carefully allocated to pay for, *inter alia*, the following: safe and adequate facilities for educating students; quality instructional materials and programs; competitive compensation to attract qualified teachers and staff; and other operating expenses necessary for maintaining quality schools. Like all employers, public school districts must also incur the significant legal expenses associated with defending against lawsuits that are brought by their employees, with such expenses frequently being

unrecoverable even when the school district prevails in the litigation. However, in contrast to other employers, these expenses are in addition to the litigation costs already borne by school districts for lawsuits which may be initiated by students, parents or other members of the public.

Although NSBA and its members respect the various state and federal laws that apply to them, and understand that individuals whose legal rights have been violated should be able to seek redress, they also expect the legal system to recognize the drastic impact on a school district's resources when statutory rights are unjustifiably expanded in a way that increases the potential for excessive and costly litigation. As shown above, Petitioner's interpretation of the anti-retaliation provisions of Title VII—that mere passive cooperation in an employer's internal investigation constitutes protected activity—goes beyond the intent of Congress and upsets the balance between individual rights and the employer's ability to manage its workplace without court intervention. As this Court has noted, the "displacement of managerial discretion by judicial supervision finds no support in the Court's precedents." *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Under Petitioner's view, school district employees with no desire to engage in protected activity under Title VII, and who are culpable for misconduct or poor performance, could invoke the protections of Title VII as a form of job insurance simply because that employee answered questions during an investigation of an alleged unlawful employment practice. "Title VII, like the ADA, is not a job insurance policy." *Prendergast v. A. Sulka*

& *Co.*, 1996 WL 617079, *12 (N.D. Ill. 1996) (*citing Hedberg v. Indiana Bell Telephone Co.*, 47 F. 3d 928, 934 (7th Cir. 1995)). Such a scenario would raise the specter of expensive litigation and force school districts into a Hobson's choice: settle with the undeserving employee to avoid a meritless lawsuit, or expend resources to defend the meritless lawsuit. *See, e.g., Auguster v. Vermilion Parish Sch. Bd.*, 249 F. 3d 400, 404 (5th Cir. 2001)(affirming grant of summary judgment against elementary school teacher on Title VII discrimination claim, where teacher was terminated for poor performance); *Pipkin v. Bridgeport Bd. of Educ.*, 159 Fed. Appx. 259 (2d Cir. 2005)(affirming summary judgment against teacher raising Title VII and ADEA discrimination claims where teacher demonstrated poor performance); *Johnson v. Atlanta Indep. Sch. Sys.*, 137 Fed. Appx. 311, 314 (11th Cir. 2005)(affirming summary judgment for school district on claims of discrimination, retaliation and violation of due process asserted by teacher with a "documented history of performance deficiencies"). As an unavoidable consequence, the limited public resources utilized by public school districts will be compromised, and the ability to provide a quality education will suffer.

Even more important than the financial ramifications is the impact that Petitioner's view of Title VII will have on the practical ability of public school districts to achieve their mission. NSBA member school districts must carefully manage teachers, administrators and staff to ensure that their employees create an educational environment that is safe, effective, and conducive to learning. *Henerey ex rel. Henerey v. City of St. Charles, Sch.*

*Dist.*, 200 F. 3d 1128, 1135 (8th Cir. 1999)("School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded . . .."). In addition, unlike most private sector employers, public school districts must, in their supervision of personnel, navigate through a myriad of additional employee protections guaranteed through collective bargaining agreements, constitutional requirements and specific state statutes that create job security. School employees have a panoply of remedies at their disposal to challenge adverse personnel determinations. Some of these remedies allow employees to challenge acts of alleged discrimination and retaliation (i.e., anti-discrimination provisions in a collective bargaining agreement, First Amendment association claims under 42 U.S.C. § 1983, and state laws that prohibit discrimination against school district employees),[6] and on other grounds that are not tied to discrimination in the workplace (i.e., teacher tenure statutes). *See, e.g., City Sch. Dist., Peekskill v. Peekskill Faculty Ass'n*, 398 N.Y.S.2d 693, 695 (N.Y. App. Div. 1977)(holding that teacher's claim for retaliation based on exercise of statutorily protected rights was subject to arbitration under collective

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[6] *See, e.g., Marshall v. Allen*, 984 F. 2d 787, 798 (7th Cir. 1993) (employee who intentionally associated with female employees who alleged sex discrimination allowed to proceed with association claim because the protest involved matter of public concern); Florida Education Equity Act (prohibiting, *inter alia*, "discrimination on the basis of race, ethnicity, national origin, gender, disability, or marital status against a student or an employee in the state system of public K-20 education.. .") Fla. Stat. § 1000.05(2)(a) (2008)

bargaining agreement, as such action would not be a "just cause" dismissal); *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F. 3d 583, 587 (6th Cir. 2004)(holding that collective bargaining agreement between the teachers' union and school board created constitutional due process property interest in employment); *Glanville v. Hickory County Reorg. Sch. Dist. No. I*, 637 S.W.2d 328, 331 (Mo. Ct. App. 1982)(holding that teacher tenure statute prohibited adverse action taken in retaliation for exercising free speech rights); Ark. Code Ann. § 6-17-1503 *et seq.* (allowing teacher dismissal only for "just and reasonable cause" based on legislative finding that teachers needed additional job protection beyond prohibition against "arbitrary, capricious, or discriminatory" dismissals); Wis. Stat. § 118.20(1) (prohibiting discrimination against teachers on the basis of sex, race and other factors).

Petitioner's unnecessarily broad interpretation of what constitutes protected activity under Title VII will add an additional and unjustified burden on every public school district's ability to manage its employees: the ability of public school districts to remove underperforming personnel will be undermined, and the quality of education in our schools will suffer.

Both before and after the enactment of Title VII, employers have by and large effectively utilized their internal policies and procedures to investigate allegations of misconduct prior to any court or agency intervention. If it was necessary to make such internal investigations subject to court supervision, as Petitioner would have the Court hold, then Congress would have remedied the problem by making it clear that employees who

merely cooperate in internal investigations fall within the coverage of Title VII. By comparison, in enacting the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.* (2008) ("ADA"), Congress expressly included a more expansive form of protection for individuals who claim to have been retaliated against based upon their mere passive involvement with alleged victims of discrimination. *Id.* at § 12112(b)(4) (prohibiting employer from discriminating against an individual because of her association with a qualified individual with a disability). The ADA not only includes express protection for those who associate with individuals protected by the ADA, but, also contains an anti-retaliation provision that is more expansive than Title VII. Section 12203(b) of the ADA contains the same type of opposition clause and participation clauses as Title VII, but goes on to protect those who simply exercise their rights under the ADA or who assist others in doing so. *Id.* at § 12203(b). No such provision exists in Title VII.

To avoid the negative impact that Petitioner's view would have on the provision of quality public education in this country, NSBA urges this Court to hold that mere passive involvement in an employer's internal investigation, prior to the initiation of an administrative investigation by the Equal Employment Opportunity Commission, is not "opposition" or "participation" under Section 704(a) of Title VII.

## CONCLUSION

For all of the above reasons, the National School Boards Association as *Amicus Curiae*,

respectfully requests that this Honorable Court affirm the Sixth Circuit's decision in all respects.

Respectfully submitted,

FRANCISCO M. NEGRÓN, JR.*
General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
703-838-6722
**Counsel of Record*

ROBERT J. SNIFFEN
Sniffen Law Firm, P.A.
211 East Call Street
Tallahassee, FL 32310
850-205-1996

F. DAMON KITCHEN
Constangy, Brooks & Smith, LLC
200 West Forsyth Street, Suite 1700
Jacksonville, FL 32202
904-356-8900

JACK R. WALLACE
Constangy, Brooks & Smith, LLC
212 E. 84th Street, Suite 5A
New York, NY 10028
646-797-9347

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